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PACIFIC TELESIS.
Group-Washington

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December 20, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: *CC Docket No. 96-237, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its *"Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Jay Bennett

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996	CC Docket No. 96-237

COMMENTS OF PACIFIC TELESIS GROUP

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Date: December 20, 1996

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SUMMARY

Extensive regulation is not necessary to implement Section 259. Congress requires the Commission to establish conditions that promote cooperation between LECs and qualifying carriers. Thus, the Commission is exactly right in concluding that infrastructure sharing arrangements should be the product of negotiations among the parties. To that end, the Commission should not micro-manage the infrastructure sharing process but instead adopt only general guidelines that will assist the parties to achieve greater efficiency in their cooperative infrastructure arrangements. Foregoing unnecessary regulation will best permit the implementation of Congressional goals for Section 259 and will be consistent with the de-regulatory national policy framework of the 1996 Act.

Congress intended Sections 251 (on interconnection, unbundled elements, and resale) and 259 (on infrastructure sharing) to serve distinctive purposes. The implementation of each should reflect that difference. In the absence of concerns about anticompetitive behavior and nondiscrimination requirements, only general guidelines are necessary. Guidelines are appropriate where cooperation, not competition, is the backdrop for sharing arrangements. Guidelines can clarify the intent and principles of Section 259, providing some certainty and efficiency to the negotiation process. Guidelines will also permit carriers the flexibility needed to accommodate individual qualifying carrier requirements, network evolution, and operating conditions and economics.

Neither infrastructure sharing nor negotiated arrangements is novel among BOCs and independent LECs, many of whom are small or serve less densely populated communities.

Without extensive oversight by their regulators, BOCs have successfully shared their infrastructures with independent carriers. Pacific Bell and Nevada Bell have a long history of permitting independent carriers that generally lack their own resources to use Pacific Bell's and Nevada Bell's networks so that independent carriers can serve their customers. Accordingly, there is no need for regulations to implement Section 259. The Commission should permit carriers to continue the practices which have successfully met independent carriers' infrastructure needs.

For example, the Commission should not attempt to further explicate the terms "public switched network infrastructure, technology, information and telecommunications facilities and functions." Specific rules or definitions may impede infrastructure sharing. Instead, the Commission's guidelines should clarify that the intent of Section 259 requires a LEC to share elements of its public switched network that a qualifying carrier needs in order to provide telecommunication services to its customers. Resale, however, is not within the scope of the terms of Section 259(a) because it is a competitive activity.

Similarly, a LEC's proprietary information that a qualifying carrier does not need in order to provide services using the public switched network should not be considered "information" within the meaning of this section. Information sharing does not imply a joint planning obligation. However, joint planning would be appropriate if the parties elect joint ownership or operation of infrastructure. Joint ownership or sharing would not require any changes to Part 32 rules.

The Commission or the state should only become involved in the negotiation process if parties are unable to reach agreement. In that case, existing dispute resolution processes, such as informal settlements, declaratory rulings and the complaint processes are sufficient.

If, however, guidelines clarifying the intent and principles of Section 259 would increase the efficiency of the parties' negotiating process, the Commission should consider the following issues:

- Sections 251 and 259 both should be available to non-competing carriers. Nothing in the 1996 Act or Section 259 suggests that a non-competing carrier is limited to sharing under Section 259. A competing LEC cannot obtain infrastructure or services pursuant to Section 259 but a non-competing qualifying carrier may elect infrastructure sharing under either Sections 259 or 251.

- Providing LECs should have the option to offer infrastructure sharing arrangements as common carriage or as private carriage. Section 259(b)(3) does not preclude providing LECs from electing to offer common carrier infrastructure sharing arrangements. Arrangements offered pursuant to tariff would be treated as regulated service for Part 64 purposes and subject to common carriage requirements including nondiscrimination and expansion requirements.

- The Commission should read the limitation on a qualifying carrier's use of shared infrastructure to compete with the providing LEC broadly. Limiting Section 259(b)(6) to only services or access would be inconsistent with promoting cooperation between providing LECs and qualifying carriers. Concomitantly, the Commission should prohibit infrastructure shared under Section 259 from being used by a third party to compete against the providing LEC. A providing LEC should be able to terminate an agreement if the qualifying carrier is offering or providing service or access in the providing LEC's service area. The competing carrier can challenge that termination through either a formal complaint procedure or a contract action. The terminated party's choice should determine who has the burden of proof.

- Economically reasonable infrastructure agreements will ensure that qualifying carriers fully benefit from LECs' economies of scale and scope. The Commission should not require LECs to develop, purchase or install network infrastructure, technology, facilities or functions solely to satisfy a request from a qualifying carrier.

- Section 259 does not give the Commission authority to establish pricing standards expressly or by implication. The Commission must take its guidance from the language of Section 259(b)(4) which directs the Commission to determine *guidelines*, not rules. National standards on pricing would be especially inappropriate because they would fail to take into account local conditions that may affect the costs of providing services, thus leading to economically unreasonable arrangements.

- If the Commission deems pricing guidelines to be necessary, they should only ensure that the terms first, fully compensate the providing LEC for all relevant costs; and second, ensure that the costs are the lowest amount that permits the LEC to completely recover all relevant costs. Relevant costs should include actual costs, a fair amount of shared costs and overheads as well as a proper return on its investment -- what the providing LEC would have anticipated if it had invested in the "next best" investment. All relevant costs should, however, be less than the stand-alone cost of the shared infrastructure if it were provided by the qualifying carrier, thus ensuring that the providing LEC's economies of scope and scale fully benefit the qualifying carrier.

- The Commission should define "qualifying carrier" broadly. While Congress intended small and rural LECs to be the primary beneficiaries of infrastructure sharing, nothing in the Act or Section 259 precludes any carrier that otherwise meets the two essential characteristics from eligibility for infrastructure sharing. The Commission should not read in such requirement nor limit qualifying carriers to adjacent carriers. Some requests by qualifying carriers may not be distance sensitive and geographic proximity will be irrelevant. However, if distance contributes to cost, the providing LEC is required to share infrastructure only if it is economically reasonable

- New notice provisions about changes to network infrastructure are unnecessary to accomplish sharing goals and would be unnecessarily burdensome and confusing. Qualifying carriers should receive sufficient notice pursuant to Section 251(c)(5) and the other disclosure requirements cited by the NPRM.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996	CC Docket No. 96-237

COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("Pacific") hereby respectfully submits its comments in the above-captioned docket. In the Notice of Proposed Rulemaking ("NPRM"), the Commission proposes to adopt rules to implement Section 259 of the 1996 Telecommunications Act.[1]

I. INTRODUCTION

Section 259 of the Telecommunications Act requires an incumbent local exchange carrier to make available public switched network infrastructure, technology, information and telecommunications facilities and functions to carriers with universal service obligations that lack economies of scale or scope. By this provision, Congress intended for customers of "smaller" LECs to have reasonable access to services through the shared use of LECs' facilities in order to advance the universal service goals of the 1996 Act. Providing LECs, however, were not to be economically burdened by the sharing agreements. The Act requires sharing only if the

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

carriers are not in competition and if the providing LEC is not financially harmed. Thus, the parties would be able to establish fair, reasonable agreements since they would both benefit from infrastructure sharing.

Against this background, it becomes clear that extensive regulation is not necessary to implement Section 259. The Commission should only adopt general guidelines that will assist the parties to achieve greater efficiency in their cooperative infrastructure arrangements. Foregoing unnecessary regulation will best permit the implementation of Congressional goals for Section 259 and will be consistent with the de-regulatory national policy framework of the 1996 Telecommunications Act.[2]

II. THE LEGISLATIVE HISTORY MAKES CLEAR THAT CONGRESS INTENDED SECTION 259 TO PROMOTE THE AVAILABILITY OF ADVANCED TELECOMMUNICATIONS SERVICES

Congress included the infrastructure sharing concept in Section 259 of the 1996 Act. Although its immediate source was Section 106(a) of S. 652, neither the Conference Report nor the Senate Report clarifies the intent or meaning of this provision. However, H.R. 3636, the telecommunication reform bill considered by the preceding Congress made the purpose of this section apparent.

H.R. 3636 contained nearly identical provisions to those finally adopted as Section 259 and thus its history is illustrative. See H.R. 3636, Section 102(a) (proposed 47 U.S.C. §229(3)(c)). The Report of the House Commerce Committee on H.R. 3636 explains the purpose of the infrastructure sharing provision:

[2] S. Conf. Rep. No. 104-230, 104th Cong., Sess. 1 (1996).

> The basic premise of this subsection is that some local exchange carriers will have the economies of scale or scope that will allow them to offer advanced services and technologies to their customers. However, other carriers will lack these economies of scale or scope so that the costs of providing these services to their customers will be prohibitively expensive. Thus, this subsection seeks to promote the availability of advanced telecommunications services to customers located in sparsely populated and other rural areas, since such areas often do not offer economies of scale or scope to attract the provision of advanced telecommunications services. H.R. Report No. 103-560, at 69 (1994).

What Congress intended was for customers of "smaller" LECs to have access to advanced services through the shared use of facilities of larger LECs, thus furthering the universal service goals of the 1996 Act.

Congress, however, did not want to discourage carriers from constructing their own facilities in those cases where it would promote better service and more competition. To illustrate this point, the House Report stated that, to be considered a qualifying carrier, a LEC must "lack economies of scale or scope for a particular service or technology in a given geographic area," "be a provider of all universal services," and "offer these universal services to all customers throughout the corresponding exchange area. ...." It further clarified that "this last requirement means that the carrier cannot limit its service to a specific geographic area within an exchange area, such as a suburb or business district, nor can it offer service to only a class of customers, such as business customers." H.R. Report. No. 103-560, at 69 (1994).

Congress also sought to ensure that providing LECs are not economically burdened as a result of sharing agreements. The Report explains,

> [T]he Committee intends to preclude a providing carrier from being required to provide a facility or establish capacity in a manner or to a degree that would not be cost-effective. The Committee further finds that it would be

> economically unreasonable to require a local exchange carrier to share network technology and information and telecommunications facilities and functions with every qualifying carrier in the country. Rather, the Commission should impose reasonable limits on the ability of qualifying carrier to seek access, and should consider enabling a qualifying carrier to engage in infrastructure sharing only with a local exchange carrier that was reasonably proximate contiguous to the qualifying carrier's service area.
> H.R. Report. 103-560, at 69-70 (1994).

Thus, Congress intended that there be sharing arrangements only where the providing LEC is not financially harmed.

As the legislative history makes clear, Congress intended the infrastructure sharing provision to result in fair, reasonable agreements between large and small LECs. Since both parties will benefit from these agreements, the Commission can and should refrain from any unnecessary regulation that could prevent the parties from developing arrangements to meet the qualifying carrier's needs.

III. THE COMMISSION SHOULD ADOPT GENERAL GUIDELINES CONSISTENT WITH THE INTENT OF THE SECTION

Cooperation between sharing parties must be the basis of implementing Section 259. Section 259(b)(5) is explicit. The Commission is required to establish conditions that promote cooperation between LECs and qualifying carriers. Specific provisions of Section 259 also make clear that Congress intended an incumbent LEC's obligations under infrastructure sharing to be reasonable and not unduly burdensome. Thus, the Commission is exactly right in concluding that infrastructure sharing arrangements should be the product of negotiation among parties. NPRM, paras. 7, 21. To that end, the Commission should not micro-manage the infrastructure sharing process but instead adopt only general rules and guidelines as it proposes.

A. The Implementation Of Sections 259 And 251 Should Reflect Their Distinctly Different Purposes

Congress intended Sections 251 and 259 to serve distinct purposes although they are complementary to the extent they promote universal service. The intent of Section 251 is to enable competition to an incumbent LEC; on the other hand, Section 259 is intended to enable advanced telecommunications to be made available to all Americans. Those different purposes should drive the Commission's implementing regulations for each section. Section 251 is about promoting competition. It is meant to require interaction between the incumbent LEC and competing carriers. No such compulsion is necessary to accomplish what Section 259 intends. There, a providing LEC and a non-competing carrier will interact on a cooperative, sharing basis. Because Section 259 does not require a LEC to share infrastructure if a qualifying carrier will use the shared infrastructure to compete with the LEC in its service area, concerns about anticompetitive behavior by incumbent LECs are absent and should not influence the definition of LEC obligations. Similarly, since sharing arrangements cannot be deemed common carrier services, no regulations are needed to ensure nondiscriminatory offerings. In the absence of concerns about anticompetitive behavior and nondiscrimination requirements, only general guidelines are necessary.

Despite the differences described above, however, Sections 251 and 259 are similar in that neither provision gives the Commission authority over intraLATA services. NPRM, para. 18. The express references to the states (pursuant to filing contracts in Section

259(b)(7) and in designating qualifying carriers in Section 259(d)) in no way overcome the application of Section 2(b) of the Communications Act, which reserves authority over intrastate matters to the states. The dual jurisdictional scheme intended by the Communications Act applies to infrastructure sharing arrangements. Moreover, the Commission has authority to preempt state regulation only to the extent that inconsistent state regulation frustrates federal policy. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

B. Guidelines Are Appropriate Where Cooperation, Not Competition, Is The Backdrop For Sharing Arrangements

As discussed above, Sections 259 and 251 should not be seen as overlapping. Given the differences between the sections, the specificity in defining rights and obligations that may have furthered the objectives of Section 251 should not be applied to Section 259. In fact, the detailed regulation that implements Section 251 is entirely unnecessary for Section 259 given the basic premise that the parties should be free to negotiate cooperative infrastructure sharing arrangements. On the other hand, Commission guidelines, clarifying the intent and principles of Section 259, could provide some certainty, and consequently, efficiency to the negotiation process. Guidelines in place of rules will also permit carriers the flexibility needed to accommodate individual qualifying carrier requirements, network evolution, operating conditions and economics. Congress recognized flexibility as beneficial by prohibiting regulators from treating providing LECs as common carriers with respect to their infrastructure sharing arrangements. Section 259(b)(3).

Neither infrastructure sharing nor negotiated arrangements are novel among BOCs and independent LECs, many of whom are small or serve less densely populated communities. Without extensive oversight by their regulators, BOCs have successfully shared their facilities with independent carriers. Pacific Bell and Nevada Bell have a long history of permitting independent carriers that generally lack their own resources to use Pacific Bell's or Nevada Bell's networks so that independent carriers can serve their customers. For example, independent LECs connect to our networks to originate and terminate intraLATA, Intrastate/InterLATA and Interstate traffic. This interconnection has been accomplished successfully without formal regulation for many years. Currently, several independent LECs interconnect to Pacific Bell's Frame Relay network based on negotiated agreements. Several independent LECs connect to Pacific Bell for intraLATA Operator Services provided under contract. Numerous examples abound of cooperation between us and independent carriers. Section 259 merely confirms the policy that we have lived out over time. Our relationships with the independent carriers have been cooperative and without major disputes -- all without specific regulations. Thus, there is no need for the Commission to set specific rules to implement infrastructure sharing. The commission should permit carriers to continue the practices which have successfully met independent carriers' needs.

The Commission's overall approach to the implementation of Section 259 recognizes these facts. The NPRM concludes that Section 259-derived arrangements should be largely the product of negotiations among parties. We strongly support this approach. The Commission should permit carriers to continue their practices which have successfully met independent carriers' infrastructure needs. Accordingly, in establishing regulations pursuant to Section 259(a), the Commission should simply repeat the statutory language without further embellishment. Guidelines can be set out in the text of the Commission's order.

C. Specific Rules Or Definitions May Impede Accomplishing Infrastructure Sharing

The Commission should not attempt to further explicate what must be shared pursuant to the terms "public switched network infrastructure, technology, information and telecommunications facilities and functions." Specific definitions will necessarily be static and unlikely to accommodate rapidly changing technology or services. Moreover, where carriers are free to negotiate their agreements, there is little need to specifically limit what those agreements can and cannot concern. In fact, in the context of cooperative arrangements, unless the Commission attempts to limit a qualifying carrier (entitled to share infrastructure under Section 259) from obtaining interconnection or unbundled network elements pursuant to Section 251, defining these terms will have little purpose. However, as we discuss below, the Commission should avoid that interpretation which the Act does not support.

Instead of defining public switched network infrastructure, technology, information and telecommunications facilities and functions, the Commission's guidelines should clarify that the intent of Section 259 requires a LEC to share elements of its public switched network that are needed by a qualifying carrier in order to provide telecommunication services to its customers. Resale, however, is not within the scope of the terms of Section 259(a). NPRM, para. 10. Section 259, which expressly applies only to non-competing activities of a qualifying carrier, should not include resale, which is a competitive activity. Similarly, a LEC's proprietary information that a qualifying carrier does not need in order to provide services using the public switched network should not be considered "information" within the meaning of this section. Examples of unnecessary information include subscriber, marketing or other proprietary business information. Proprietary technology or information that a qualifying carrier legitimately needs in order to provide telecommunications services to its customers should be made available pursuant to reasonable licensing arrangements and appropriate contractual protections such as nondisclosure agreements.

Information sharing, however, does not imply any sort of joint planning obligation. NPRM, para. 16. If, as the NPRM recognizes, a LEC must share only existing infrastructure, any requirement to engage in joint planning for *new* infrastructure would be incongruous. However, joint planning would be appropriate if the parties elect joint ownership or operation of infrastructure. We agree with the NPRM that joint ownership or operation of public switched network infrastructure and services would be another method by which an incumbent LEC may meet its sharing obligation. Joint ownership or sharing would not require any changes to Part 32 rules. NPRM, para. 21. Each carrier would simply account for its ownership interest according to existing Part 32 rules.

Similarly, detailed national rules are not necessary. NPRM, para. 25. National rules will not accommodate flexibility in sharing arrangements and will not promote cooperation. Instead the Commission's guidelines should only describe the purpose of infrastructure agreements and permit the parties to negotiate mutually agreeable terms and conditions. The Commission or state regulator should become involved only if parties are unable to reach agreement. In that case, existing dispute resolution processes, such as informal settlements, declaratory rulings and the complaint processes are sufficient. The Commission is correct in concluding that it does not need to develop new procedures to resolve disputes.

IV. THE COMMISSION NEED ONLY CLARIFY THE INTENT AND PRINCIPLES OF SECTION 259 THAT PARTIES SHOULD PUT INTO EFFECT IN THEIR AGREEMENTS

Given the clear intent of Section 259, the Commission should refrain from adopting detailed rules. If, however, guidelines clarifying the intent and principles of Section 259 could increase the efficiency of the parties' negotiating process, the Commission should consider the following issues.

A. Sections 251 And 259 Are Both Available To Non-Competing Carriers

The NPRM asks if Section 259 is the exclusive means by which a qualifying carrier may obtain an incumbent LEC's public network infrastructure in order to provide service. NPRM, paras. 13, 14. Neither the language nor the construction of the 1996 Act supports that interpretation. While a competing LEC cannot obtain infrastructure or services pursuant to Section 259, a non-competing qualifying carrier may elect infrastructure sharing under either Section 259 or Section 251 pursuant to the conditions of each section. Section 259 expressly permits a qualifying carrier to do so; and there is no limitation in Section 251 on telecommunication carriers that are eligible to obtain interconnection, unbundled elements, or resale. Section 251 does not exclude telecommunication carriers that meet the definition of qualifying carrier.

The Commission asks if overlapping Sections 251 and 259 can be used for promoting the development of competition, particularly in rural markets. NPRM, para. 14. We believe so to the extent that both Sections 251 and 259 provide access to a LEC's infrastructure, albeit it under different circumstances. Elements or services obtained pursuant to Section 251 may be used to compete with either the providing LEC or another carrier.

However, in the interest of promoting cooperation between providing LEC and qualifying carriers, the Commission should prohibit infrastructure shared under Section 259 from being used by a third party to compete against the providing LEC.

B. Providing LECs Should Have The Option Of Offering Infrastructure Sharing Arrangements As Common Carriage Or As Private Carriage

Section 259(b)(3) acts to limit regulators from classifying providing LECs as common carriers or their infrastructure sharing arrangements as common carrier services. However, it does not preclude providing LECs from electing to offer common carrier infrastructure sharing arrangements. Providing LECs should have the option of offering infrastructure sharing arrangements either as common carriage or on a private carriage basis. Arrangements offered pursuant to tariff would be treated as regulated service for Part 64 purposes and subject to common carriage requirements including nondiscrimination and expansion requirements. On the other hand, infrastructure sharing agreements could be private contracts, non-tariffed and nonregulated subject to Part 64 allocation rules.

The language of Section 259(b)(3) that requires infrastructure sharing to be made available "to any qualifying carrier" does not imply an inherent nondiscrimination requirement. NPRM, para. 22. A providing LEC is not required to make arrangements available to similarly situated qualifying carriers on the same terms. First, implying a nondiscriminatory requirement would be inconsistent with Section 259(b)(1) that prohibits regulations that require LECs to take any action that is economically unreasonable. Requiring the same terms and conditions for infrastructure arrangements could result in economically unreasonable agreements. Second, that implication would, in effect, eliminate the prohibition of Section 259 (b)(3) against regulations that treat infrastructure sharing arrangements as common carrier offerings.

C. The Limitation On A Qualifying Carrier's Use Of Shared Infrastructure To Compete With The Providing LEC Must Be Read Broadly

The intent of Section 259 to promote cooperative access to advanced telecommunications infrastructure is clear. Section 259(b)(6) prohibits the Commission from requiring providing LECs to engage in sharing for services or access which the qualifying carrier would provide or offer to consumers in the providing LEC's service area. Therefore, the terms "services or access" must be understood to apply to all public switched network infrastructure technology, information, and telecommunications facilities and functions. NPRM, para. 26. A narrow reading restricting the language of Section 259(b)(6) to only services or access would limit its application so that it would be inconsistent with the otherwise stated requirement that the Commission establish conditions to promote cooperation between providing LECs and qualifying carriers.

Consistent with the notion that cooperation, not competition, is the purpose of Section 259, we agree that a providing LEC may terminate an agreement if the qualifying carrier is offering or providing service or access in the providing LEC's service area.[3] NPRM, para. 27. However, the providing LEC should not have the burden of proving that the qualifying carrier is a competing carrier. If the LEC terminates a sharing arrangement, the competing carrier can challenge the termination through either a formal complaint procedure or

[3] As previously discussed at p. 11, the Commission should prohibit infrastructure shared pursuant to Section 259 from being used by a third party to compete with the providing LEC.

a contract action. The terminated party's choice will determine who has the burden of proof. However, because of the potential effect on the competing carrier's customers, a providing LEC should give notice before terminating an infrastructure sharing arrangement for cause pursuant to Section 259(b)(6). Sixty days notice should be sufficient for the competing carrier to make other arrangements to avoid disrupting service to its customers.

The requirement that incumbent LECs file tariffs, contracts or other arrangements also applies to all infrastructure sharing agreements. Filings should be made with the jurisdiction that regulates the service that is the subject of the agreement.

D. Economically Reasonable Infrastructure Agreements Will Ensure That Qualifying Carriers Fully Benefit From The LEC's Economies Of Scale And Scope

Congress's intent to support universal service and access to advanced service through reasonable infrastructure sharing requirements is evident by the terms of Section 259(b)(1). It prohibits regulation that would require a providing LEC to take any action that is economically unreasonable or that is contrary to the public interest. The NPRM's conclusions supporting economically reasonableness are well founded. LECs should not be required to develop, purchase or install network infrastructure, technology, facilities or functions solely to satisfy a request from a qualifying carrier. NPRM, para. 20. Interconnection and other regulatory requirements designed to promote competition and market pressures to meet competition place heavy demands on a carrier's capital resources. LECs, like other companies, have limited access to capital markets. Congress did not intend by Section 259 to permit qualifying carriers to prioritize LECs' capital expenditures.

The Commission must take its guidance from the language of Section 259(b)(4) when considering its role in ensuring that sharing occurs on "just and reasonable terms and conditions that permit qualifying carriers to fully benefit from economies of scale and scope of the providing LEC." That section directs the Commission to determine *guidelines*, not rules. Section 259 does not give the Commission authority to establish pricing standards expressly or by implication. In fact, there is a contrary implication from the requirement that the Commission ensure conditions which promote cooperation between the parties. The parties themselves should develop the terms and conditions, including prices. Moreover, it would be ludicrous to believe that the Commission should set pricing standards for cooperative sharing arrangements when Congress did not require such intrusive behavior even for competing carriers. Section 252(a)(1) permits an incumbent LEC and competing carrier to agree on interconnection terms and conditions (including prices) "without regard to the standards" set by the Commission in Section 251. 47 U.S.C. 252(a)(1). Thus, interconnection prices are only set if parties are unable to reach agreement.[4]

National standards on pricing would be especially inappropriate. They would fail to take into account local conditions that may affect the costs of providing services, effectively countermanding Section (b)(1) that prohibits the Commission from requiring a providing LEC from taking any action that is economically unreasonable. National standards would also hinder carriers from developing unique sharing arrangements that may be especially

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Dkt. No. 95-185, *First Report and Order*, FCC 96-325 (Rel. August 8, 1996), para. 618.

well-suited to meet a qualifying carrier's needs and may prevent a carrier from fully benefiting from the LEC's economies of scale and scope. The parties to a sharing agreement are much better suited to understanding what pricing is just and reasonable for their arrangements. On balance, any administrative saving through reduced recordkeeping as a result of national pricing standards would be trivial. NPRM, para. 24. The Commission should not adopt national pricing standards.

If, however, the Commission concludes that guidelines are necessary, it should keep in mind that the requirement for economically reasonable infrastructure sharing arrangements is the correlative of the requirement for just and reasonable terms and conditions that permit a qualifying carrier to fully benefit from the economies of scale and scope of the sharing LEC. Thus, guidelines should advise the parties to establish terms that first, fully compensate the providing LEC for all relevant costs; and second, ensure that the costs are the lowest amount that permits the LEC to completely recover all relevant costs. Relevant costs should include actual costs, a fair amount of shared costs and overheads as well as a proper return on its investment -- what the providing LEC would have anticipated if it had invested in the "next best" investment. Limiting the providing LEC's return on investment to a specific rate of return is inappropriate for non-common carrier services and inconsistent with negotiated agreements. The parties should be able to determine what return on investment would satisfy reasonable shareholders' expectations of the return appropriate for the use of their capital. All relevant costs should, however, be less than the stand-alone cost of the shared infrastructure if it were provided by the qualifying carrier, thus ensuring that the providing LEC's economies of scale and scope fully benefit the qualifying carrier.

If a providing LEC determines that an agreement becomes economically unreasonable because of changed market conditions, it should be able to renegotiate the agreement with the qualifying carrier.

E. The Commission Should Define "Qualifying Carrier" Broadly

Two essential characteristics define "qualifying carrier" according to Section 259(d): a lack of economies of scale or scope and the designation to receive universal service support pursuant to Section 214(e). NPRM, para. 12.

We agree with the Commission that this definition would apply to many small LECs. As we discussed above, the legislative history of H.R. 3636, the predecessor of Section 259, strongly supports an interpretation that small and rural LECs were intended as the primary beneficiaries of infrastructure sharing. However, nothing in the 1996 Act or Section 259 precludes any carrier that otherwise meets the two essential characteristics from eligibility for infrastructure sharing. The Commission should not read in such requirement. Congress used the term economies of scale or scope to delineate carriers that would not be able to provide services except at high cost. NPRM, para. 37. Size is not an absolute correlative of economies of scale or scope. Whether a carrier lacks economies of scale or scope should be evaluated at the carrier level. Moreover, a carrier may lack economies of scale or scope for some, but not all facilities or services.

Similarly, while prior legislative history supports a geographic proximity limitation, the Commission should not limit qualifying carriers to adjacent carriers, unless the Commission adopts pricing rules. If the parties are free to negotiate the terms and conditions of their arrangements, this restriction is unnecessary because Section 259 permits a providing

LEC to avoid economically unreasonable requests. Some requests by qualifying carriers may not be distance sensitive and geographic proximity will be irrelevant. However, if distance contributes to cost, the providing LEC must share infrastructure only if it is economically reasonable. Moreover, limiting infrastructure sharing arrangements only to proximate qualifying carriers would be arbitrary. Some non-proximate qualifying carriers may be located as close to a providing carrier as another carrier's adjacent qualifying carrier. If parties are able to negotiate their arrangements, there are no public policies advanced by restricting sharing arrangements to adjacent carriers. A geographic restriction may interfere with the goal of providing advanced telecommunications services to all consumers.

F. New Notice Provisions Are Unnecessary To Accomplish Infrastructure Sharing Goals

Section 259(c) requires a providing LEC to make available timely information on the planned deployment of telecommunications services and equipment to parties to infrastructure sharing agreements. The Commission has tentatively concluded that Congress intended this section to provide qualifying carriers with notice of changes to the providing LEC's network that might affect qualifying carriers' ability to fully benefit from infrastructure agreements. NPRM, para. 29. We agree. However, new notice provisions are not necessary. Congress did not direct the Commission to issue regulations in Section 259(c), unlike Section 259(b). Moreover, qualifying carriers should receive sufficient notice pursuant to Section 251(c)(5) and the other disclosure requirements cited by the NPRM. Although the disclosure requirements in Section 259 are much narrower than Section 251(c)(5)'s broad notice requirements, notice under Section 251(c)(5) will also serve to inform qualifying carriers. Additional notice requirements are unnecessary and would be unnecessarily burdensome and confusing. Furthermore, if a qualifying carrier requires more or different notice, the parties are free to negotiate additional notification requirements.

V. CONCLUSION

In promulgating Section 259 Congress carefully balanced the rights and obligations of both providing LECs and qualifying carriers. Access by all consumers to advanced telecommunications services was not to be accomplished on the backs of incumbent LECs. Instead, Congress set parameters for cooperative infrastructure sharing through provisions establishing the non-competing status of qualifying carriers, the non-common carrier status of sharing arrangements, and the requirements for economically reasonable sharing agreements resulting in qualifying carriers fully benefiting from LECs' economies of